

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: October 6, 2020
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
UNITED STATES OF AMERICA,

-against-

ALBERTO PELLOT,

Defendant.
-----X

19 CR 169 (VM)

ORDER

VICTOR MARRERO, U.S.D.J.:

On February 28, 2020, the Court sentenced defendant Alberto Pellot ("Pellot") to sixty months' imprisonment followed by four years of supervised release. (See Dkt. No. 149.) The Court granted three adjournments of Pellot's surrender date due to the ongoing COVID-19 pandemic. (See Dkt. Nos. 164, 189, 199.) By letter dated October 5, 2020, Pellot requests a fourth extension of his surrender date. (See attached letter.) Pellot argues that it would be dangerous to his health to enter Federal Correctional Institution, Fort Dix ("F.C.I. Fort Dix"), the facility to which Pellot will report, given the reported conditions and minimal testing. According to Pellot, while the Government does not consent to his latest request for an adjournment of his surrender date, the Government does not intend to formally oppose the request.

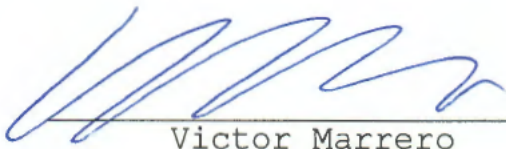
The Court denies Pellot's request for an adjournment of his surrender date. The Court understands the ongoing risks presented by COVID-19 to Pellot given his health conditions.

However, as Pellot notes, there are only three active COVID-19 cases at F.C.I. Fort Dix. See Bureau of Prisons, www.bop.gov/coronavirus/ (last visited Oct. 6, 2020). In addition, though Pellot points to two reports of poor conditions within F.C.I. Fort Dix, these reports are from May 2020 and do not necessarily reflect the present conditions. Without more specific information about current conditions at F.C.I. Fort Dix, the Court is not persuaded that a fourth adjournment is necessary to mitigate the risks posed by COVID-19.

Accordingly, it is hereby ordered that Pellot's request for adjournment of his surrender date is denied.

SO ORDERED:

Dated: New York, New York
6 October 2020



Victor Marrero
U.S.D.J.

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October 5, 2020

By Email

Honorable Victor Marrero
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

U.S. v. Alberto Pellot,
19 Cr. 169 (VM)

Your Honor:

I represent Alberto Pellot in the above-captioned case and I write respectfully to request a 60-day adjournment of his surrender date – until December 14, 2020. The adjournment is necessary because there is an active COVID-19 outbreak at FCI Fort Dix, where Mr. Pellot is designated, and Mr. Pellot is at high risk for a bad outcome should he become infected. His life will be in jeopardy danger if he surrenders next Monday. Below I provide information about Mr. Pellot’s health and the present situation at FCI Fort Dix based on what I have learned from news articles and recent judicial opinions.

I. Mr. Pellot’s Is in Terrible Health.

As documented in the PSR, Mr. Pellot is obese and has serious heart and renal conditions. PSR ¶¶ 94-98. He also has degenerative joint disease and arthritis. PSR ¶ 95. He walks with a cane and has limited mobility. In addition, Alberto has a history of kidney stones requiring hospitalization. PSR ¶¶ 94-98. He has “right bundle branch block,” a condition delaying and blocking the pathway of electrical impulses that make his heartbeat. *Id.* His heart condition and obesity place him at heightened risk should he contract COVID-19. *E.g., Roni Caryn Rabin, Obesity Linked to Severe Coronavirus Disease, Especially in Younger Patients*, N.Y. Times (last updated Apr. 17, 2020).¹

I spoke by phone this afternoon with Mr. Pellot’s doctor, Elena Nemytova of Lincoln Hospital. She provided me with a letter, attached hereto as Exhibit A, describing

¹ <https://www.nytimes.com/2020/04/16/health/coronavirus-obesity-higher-risk.html>.

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Mr. Pellot's various, and serious, health problems. They include morbid obesity, hypertension, and moderate persistent asthma – all of which are COVID-19 risk factors.

II. FCI Fort Dix Is Not Safe Right Now.

Despite BOP's phased approach to contain the spread of the virus, BOP data as of October 5, 2020, reveals that there are 15,002 federal inmates who have tested positive nationwide and 118 inmates who have died due to COVID-19, with 35 diagnosed cases at FCI Fort Dix.² There is good reason to believe that these numbers represent the tip of the iceberg of Fort Dix's COVID-19 outbreak. Only 12% of Fort Dix's inmate population has been tested even once.³ The "data suggests there are many more undetected cases within the prison" at Fort Dix.⁴

Recent articles reveal the reality of Fort Dix's approach to COVID-19: a COVID-19-infected food server continued to work for days, empty soap dispensers, no paper towels, and a senior staff member sprayed a collapsed prisoner with disinfectant before removing his mask which contained blood and vomit.⁵ Due to those conditions and the impossibility of social distancing, the American Civil Liberties Union of New Jersey filed a complaint in the District of New Jersey seeking the immediate, temporary release of medically fragile Fort Dix inmates and those over fifty years old.⁶ While the case was dismissed and the court specifically noted that vulnerable inmates could pursue other statutory avenues to seek release, the case strongly suggests that FCI Fort Dix inmates are at grave risk of COVID-19 spreading within the facility because of conditions there.⁷

2 Federal Bureau of Prisons, COVID-19 Coronavirus, COVID-9 Cases, <https://www.bop.gov/coronavirus> (last accessed Oct. 5, 2020).

3 *United States v. Farley*, 2020 WL 4698434, at *2 (D.D.C. Aug. 13, 2020).

4 *Id.* (internal quotation marks and brackets omitted).

5 Colleen O'Dea, "COVID-19 Horror Stories Prompt ACLU-NJ to File for Temporary Release of Medically Fragile Prisoners," NJ Spotlight (May 6, 2020); *see also* Jeremy Roebuck, "As COVID-19 Spreads Behind Bars at Fort Dix, Inmates Turn to Contraband Cellphones, Social Media for Help," The Philadelphia Inquirer (May 4, 2020).

6 *Wragg v. Ortiz*, No. 20 Civ. 5496 (D.N.J. May 4, 2020), Dkt. 1.

7 Colleen O'Dea, "Judge Denies Immediate Release of Certain Fort Dix Prisoners in Bid to Protect Them from COVID-19," NJ Spotlight (May 29, 2020).

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Although BOP's coronavirus website states that there are presently only three active COVID-19 cases at Fort Dix,⁸ a recent judicial decision expressed skepticism about the reliability of this information. *United States v. Brown*, 2020 WL 5801494, at *2 (E.D. Pa. Sept. 29, 2020) ("A successful strategy for dealing with the virus in prisons is to prevent the deadly scourge from infecting individuals, and one cannot know the full extent of the problem if most of the individuals at FCI Fort Dix remain untested.").

Given the reported conditions, and the reported number of cases even in spite of minimal testing, it is clear that Fort Dix is not a safe place right now for someone at a high risk should he become infected with the coronavirus.

III. Prior Adjournments

Mr. Pellot was sentenced on February 28, 2020, to 60 months in prison. His surrender date was originally scheduled for April 28, 2020. After the pandemic's onset, the Court adjourned the surrender date for 60 days "subject to further extension in the event the virus has not been officially declared materially changed by then." Dkt. No. 164. The Court granted a second 60-day adjournment in June and a third one in August. Mr. Pellot is now scheduled to report to Fort Dix FCI on October 12, 2020. The first two adjournments were on the government's consent and the third one was not.

On August 24, 2020, the Court ordered Mr. Pellot's surrender date adjourned by 45 days until October 12. Dkt. No. 199. The Court advised that it would require "more specific information about conditions at F.C.I. Fort Dix" before granting a longer adjournment. *Id.* at 2.

IV. Mr. Pellot's Surrender Date Should Be Adjourned.

Mr. Pellot will be in grave danger if he entered FCI Fort Dix right now. Given his serious health issues, should he enter prison next Monday, Mr. Pellot may very quickly find himself filing a non-frivolous compassionate release application which, at an early time in his 60-month sentence, would eliminate most of the incarceratory sentence. On the other hand, if Mr. Pellot is afforded just a few more months to surrender, a vaccine may be at hand the danger substantially lessened. He will be able to serve the entire sentence imposed by the Court.

Mr. Pellot's surrender date has been adjourned three times because he was originally scheduled to report at the height of the pandemic's first wave in this region.

⁸ <https://www.bop.gov/coronavirus/>.

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Today, a vaccine is in sight, and the head of the Secretary for Health and Human Services believes it may be available as soon as December. *See Joanna Walters, Coronavirus: Health Secretary Alex Azar Expects U.S. Vaccine by December*, The Guardian (Aug. 11, 2020);⁹ *see also* Angus Whitley, *Fauci Says “Reasonable” to Expect COVID-19 Vaccine by December*, Bloomberg Law (July 28, 2020).¹⁰

Assistant United States Attorney Sebastian Swett informs me that the government opposes this request but will not submit a response unless one is requested by the Court. Pretrial Services Officer Bernisa Mejia informs me that her office takes no position and defers to the Court. But Officer Mejia notes that Mr. Pellot remains in compliance with the terms of his release, as he has been for the past 21 months.

Mr. Pellot knows that he must serve a prison sentence for his conduct selling drugs near his rehab facility during his lifetime of cycling between heroin abuse and recovery. As his counsel, I respectfully submit that his prison sentence can be fully served even if delayed by a few more months. In fact, if Mr. Pellot is able to enter prison at a time when he will be in less jeopardy, then he will be more likely to serve the entirety of the sentence imposed by the Court – without seeking compassionate release or facing an intolerably high risk of severe illness or death.

V. Conclusion

For the foregoing reasons, I respectfully request that the Court adjourn Mr. Pellot’s report date by 60 days – until December 14, 2020. By that time, we will know whether a vaccine is close at hand, and the jails may have a firmer handle on their own situations. Mr. Pellot has remained in full compliance with the terms of his release, as confirmed to me earlier today by Pretrial Officer Mejia. He is not a danger or a risk of flight. He will be ready to surrender in a few months, when it will be less dangerous to his life.

Thank you for your consideration of this request.

Respectfully submitted,

/s/ Benjamin Silverman
Benjamin Silverman

⁹ <https://www.theguardian.com/world/2020/aug/11/CoronaVirus-vaccine-health-secretary-alex-azar-december>.

¹⁰ <https://news.bloomberglaw.com/health-law-and-business/fauci-says-reasonable-to-expect-covid-19-vaccine-by-december>.

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cc: AUSAs Sebastian Swett and Justin Rodriguez (by email)
Pretrial Services Officer Bernisa Mejia (by email)
Alberto Pellot (by U.S. mail)

Exhibit A



Lincoln

LINCOLN MEDICAL CENTER
234 E 149th Street
Medicine Pavilion
Bronx NY 10451
Dept: 718-579-5584

October 5, 2020

Letter of Condition

To Whom It May Concern:

This is to certify that Alberto Pellot is known to our practice.
He was seen and examined at our clinic last 10/5/2020. Patient has the following medical conditions:


Patient Active Problem List

Diagnosis

- Urethral stricture due to infection
- Health maintenance examination
- Essential (primary) hypertension
- Morbid obesity due to excess calories (HCC)
- BMI 40.0-44.9, adult (HCC)
- Hyperlipidemia
- Bipolar 1 disorder (HCC)
- Opioid use disorder, moderate, on maintenance therapy (HCC)
- Tobacco abuse counseling
- Moderate persistent asthma
- Primary osteoarthritis of knees, bilateral
- S/P total knee replacement, right
- Bilateral carpal tunnel syndrome
- Leukocytosis
- Colonoscopy refused

If you have any questions please do not hesitate to contact us.

ELENA NEMYTOVA, MD



Elena Nemytova, M.D.
NPI #1659647576
License #278916

This document was electronically signed on 10/5/2020